UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
2900 Crystal Drive
Arlington, Virginia 22202-3513

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Mailed: December 10, 2002

Opposition No. 150,161

Innovative Programming Associates, Inc.

v.

Varian Inc. by merger with Vankel Technology Group

Before Cissel, Hohein and Walters, Administrative Trademark Judges.

By the Board:

On October 11, 2002, the Board granted applicant's motion for judgment as uncontested. Subsequently, opposer's combined response and motion to reopen testimony was associated with the case file. In view thereof, the October 11, 2002 order is vacated and we now take up for consideration on their merits applicant's motion (filed August 16, 2002) for judgment and opposer's motion (filed September 10, 2002) to reopen testimony.

In response to a motion under Trademark Rule 2.132(a), the plaintiff must show good and sufficient cause why judgment should not be entered against the plaintiff. The "good and sufficient cause" standard, in the context of this

rule, is equivalent to the "excusable neglect" standard which would have to be met by any motion under Fed. R. Civ. P. 6(b) to reopen the plaintiff's testimony period. *See Grobet File Co. of America, Inc. v. Associated Distributors Inc.*, 12 USPQ2d 1649 (TTAB 1989); and *Fort Howard Paper Co. v. Kimberly-Clark Corp.*, 216 USPQ 617 (TTAB 1982). See also, TBMP Section 535.02.

The Supreme Court, in *Pioneer Investment Services Company v. Brunswick Associates Limited Partnership*, 507 U.S. 380 (1993), held that excusable neglect should be determined by considering the circumstances surrounding the omission. Such circumstances include (1) the prejudice to the non-moving party, (2) the length of the delay and its potential impact on judicial proceedings, (3) the reason for the delay, including whether it was within the reasonable control of the movant, and (4) whether the moving party had acted in good faith. *Pioneer Investment Services Company v. Brunswick Associates Limited Partnership*, 507 U.S. at 395. *See also Pumpkin, Ltd. v. The Seed Corps*, 43 USPQ2d 1582 (TTAB 1997).

Turning to opposer’s motion to reopen testimony, opposer’s testimony period closed on August 3, 2002 opening thirty days prior thereto. Opposer offers the following five reasons why it failed to meet the trial schedule: (1) plaintiff’s principal’s father is ill which necessitated

frequent visits to Florida and Maryland; (2) plaintiff's principal has diabetes; (3) plaintiff was confused as to the nature of the testimony and what it was to be used for; (4) plaintiff was involved in settlement negotiations and believed there was a possibility of settlement; and (5) it is difficult for plaintiff's principal to rearrange his schedule to accommodate depositions.

In its response, applicant states that none of opposer's "excuses is presented pursuant to declaration or any other form of admissible evidence." Further, with regard to opposer's health, applicant points out that opposer provided no information that "the principal was not able to participate in a testimony deposition during the testimony period." With regard to opposer's "confusion" applicant states that opposer has been represented by counsel throughout this proceeding and that "misunderstandings of procedure, or misunderstandings between counsel, cannot excuse a failure to act in a timely manner." Finally, with regard to opposer's reference to settlement negotiations, applicant states that after May 16, 2002 there were no further settlement discussions between the parties.

In evaluating the existence of excusable neglect in light of the factors set forth in *Pioneer*, and taking into

account all relevant circumstances, we believe that opposer has not met its burden.

Turning to the reason for the delay, we would first point out that it is the responsibility of a party to keep track of dates and to either meet the trial schedule set by the Board or to take steps to secure a timely extension of that schedule. As discussed below, opposer has failed to show that its inaction in this case was the result of unavoidable events or circumstances which were not within opposer's reasonable control.

Opposer provides no explanation or evidence to support the statements regarding opposer's principal's health and family obligations or to connect those statements to the trial schedule. Opposer's purported confusion about the function of the testimony period and difficulty in finding time to take its own testimony to prosecute the case it brought clearly do not constitute factors beyond its reasonable control. *See PolyJohn Enterprises Corporation v. 1-800-Toilets, Inc.*, 61 USPQ2d 1860 (TTAB 2002); *Atlanta-Fulton County Zoo, Inc. v. DePalma*, 45 USPQ2d 1858 (TTAB 1998).

With regard to any settlement negotiations between the parties, there is a dispute as to the extent and nature of any possible settlement negotiations. Moreover, even if the parties had been discussing settlement, the mere existence

of such negotiations or proposals, without more, would not justify opposer's failure to prosecute. No circumstances have been set forth to show any expectation that proceedings would not move forward during any such negotiations. *See Instruments SA Inc. v. ASI Instruments Inc.*, 53 USPQ2d 1925 (TTAB 2000); *Atlanta-Fulton County Zoo, Inc. v. DePalma*, supra (TTAB 1998).

As to the remaining *Pioneer* factors, there is no evidence of bad faith on the part of opposer and no evidence of measurable prejudice to applicant, nor has the length of the delay had an adverse impact on the proceedings.

In considering the four *Pioneer* factors, we find that the circumstances recounted by opposer do not constitute excusable neglect. In particular, in this case, we find that the third *Pioneer* factor, the reason for the delay, outweighs the other factors. *See HKG Industries Inc. v. Perma-Pipe Inc.*, 49 USPQ2d 1156 (TTAB 1998); *Atlanta-Fulton County Zoo, Inc. v. DePalma*, supra (TTAB 1998).

In view thereof, opposer’s motion to reopen is denied.

Inasmuch as opposer has not taken any testimony or made any other evidence of record during its testimony period which is now expired, and since we have denied opposer’s motion to reopen the time to introduce any such evidence, applicant’s motion to dismiss for failure to prosecute is granted. See Trademark Rule 2.132.

Accordingly, the opposition is dismissed with prejudice.

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